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## Paternalism, Public Health, and Behavioral Economics: A Problematic Combination Response

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## Article

### Paternalism, Public Health, and Behavioral Economics: A Problematic Combination

WENDY MARINER

*Many critiques of public health regulations assume that measures directed at industry should be considered paternalistic whenever they limit any consumer choices. Given the presumption against paternalistic measures, this definition of paternalism puts government proposals to regulate industry to the same stringent proof as clearly paternalistic proposals to directly regulate individuals for their own benefit. The result is to discourage regulating industry in ways that protect the public from harm and instead to encourage regulating individuals for their own good—quite the opposite of what one should expect from a rejection of paternalism. Arguments favoring “soft paternalism” or “asymmetric paternalism” to justify some regulatory measures exacerbate this trend. This Article argues that most public health regulatory measures directed at industry are not paternalistic at all, and require little, if any, justification beyond that required by law. It concludes that definitions of paternalism grounded in behavioral economics proceed from a flawed premise that muddies the debate, narrows the range of reasons for regulating industry, and instead encourages harder paternalistic regulation of personal behavior.*

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# Paternalism, Public Health, and Behavioral Economics: A Problematic Combination

WENDY MARINER\*

## I. INTRODUCTION

People do not always behave the way we wish them to behave. Government officials, businesses, non-profit organizations, religious leaders, colleagues, and friends are often disconcerted by evidence that people do not always act in their own best interests, variously defined. Should we care about such behavior? Certainly, we care when the behavior harms other people, but what about behavior that harms no one but the actor himself? Or behavior that carries only a *risk* of harm to oneself? Or behavior that, while not risking harm, fails to improve the actor's economic situation, health, or general welfare?

If we are friends, family, or colleagues, we surely care and may try to persuade or shame the person into acting differently. If we are parents, we can influence and sometimes control our children (albeit with mixed results). But should government act to prohibit, prevent, or discourage behavior that risks harm only to oneself? I focus on government, because unlike familial or social connections, government wields coercive powers.

The specific question I address here, in simplified summary, is whether the recent literature debating paternalism as a justification for government regulation offers convincing standards for evaluating the legitimacy of legislation and administrative regulations affecting individual choice.<sup>1</sup> I conclude that definitions of paternalism grounded in behavioral economics, especially what is often called "soft paternalism," proceed from a flawed premise that muddies the debate, narrows the range of reasons for regulation of industry, and instead encourages harder paternalistic regulation of individuals.

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<sup>1</sup> Not addressed here are important distinctions among the branches and levels of government (e.g., judicial, legislative, executive; or federal, state, local, tribal) and the type of action (e.g., statutory, regulatory, administrative, enforcement). See David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 551–58 (1988) (describing the distinctions in authority between the courts and legislatures). I would argue, however, that those distinctions do not affect my general conclusions.

## II. DEFINITIONS OF PATERNALISM

Debates over whether and how government should regulate individuals for their own good or protection are often couched as debates over paternalism—what it means and when, if ever, it qualifies as a normative justification for government action.<sup>2</sup> Historically, paternalism has been disfavored in the United States. The presumption seems to be that government should not adopt paternalistic legislation, except perhaps to protect from imminent harm people who cannot protect themselves.<sup>3</sup> Articles in the literature used to begin with John Stuart Mill's very simple principle,<sup>4</sup> and perhaps extend to Immanuel Kant's categorical imperative,<sup>5</sup> in order to establish the foundational value of individual autonomy and liberty.<sup>6</sup>

Recent scholarship, however, often starts with definitions from the economic literature, especially those challenging the assumption that consumers always behave rationally to achieve their own economic

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<sup>2</sup> Scholarly literature abounds with arguments over definitions of paternalism. *E.g.*, JAMES F. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE 237–38 (1982); SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM 1–7 (2013); JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 19–20 (1986); JOHN KLEINIG, PATERNALISM 5–6 (1983); RICCARDO REBONATO, TAKING LIBERTIES: A CRITICAL EXAMINATION OF LIBERTARIAN PATERNALISM 4–5 (2012); Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 65 (1972); Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 133–34 (2006); Jeffrey J. Rachlinski, *Cognitive Errors, Individual Differences, and Paternalism*, 73 U. CHI. L. REV. 207, 224 (2006); Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 659–62 (2004).

<sup>3</sup> The presumption is a matter of philosophical argument rather than law. At least with respect to the states, there is no formal prohibition on states taking paternalistic action, however defined, apart from constitutional protections of individual rights. *See generally* ERNST FREUND, THE POLICE POWER, PUBLIC POWER AND CONSTITUTIONAL RIGHTS (1904). State *parens patriae* power describes the state's authority to prevent harm to those deemed to be incompetent, including children. Federal power is more circumscribed, of course, being limited to the exercise of specific constitutional powers and those necessary and proper to carry them out, but such powers remain ample. *Nat'l Fed'n of Indep. Bus., Inc. v. Sebelius*, 132 S. Ct. 2566, 2579–80 (2012).

<sup>4</sup> *See* JOHN STUART MILL, ON LIBERTY 51–52 (Edward Alexander ed., 1999) (“[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”).

<sup>5</sup> *See* IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 45–47 (Allen W. Wood ed. & trans., 2002) (explaining the second formulation of the categorical imperative as requiring people to be treated as ends in themselves and not as means to an end).

<sup>6</sup> Some scholars use such principles to argue, not against paternalism itself, but that the legitimate scope of government power is limited to protecting individual liberty. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 322–29 (2004) (discussing early theories of state police power).

welfare.<sup>7</sup> Seminal research on how people think by psychologists Daniel Kahneman, Amos Tversky, and others prompted some economists to admit that people do not necessarily behave like the rational man of neoclassical economic theory.<sup>8</sup> The efforts of some economists to adjust rationality-based economic theories to the reality of complex human behavior produced “behavioral economics.”<sup>9</sup> Most behavioral economists use the psychology literature to argue that human beings are subject to cognitive biases that cause them to make errors of fact,<sup>10</sup> thereby challenging neoclassical economic theory that true preferences can only be revealed by actual behavior.

Economists remain divided over theories of rational versus irrational economic decision makers, as demonstrated by the different views presented by the three recipients of the 2013 Prize in Economic Sciences awarded by the Nobel committee in Stockholm.<sup>11</sup> Critics of behavioral economics lean toward the neoclassical school of economics. They offer both theoretical and empirical critiques, most of which argue for resisting or severely restricting government intervention, especially in commercial affairs.<sup>12</sup> Perhaps the most persuasive critique is that research in psychology seeks to identify how people think, not catalog errors in judgment; but behavioral economics theory focuses almost entirely on the likelihood of such errors to justify remedial regulation.<sup>13</sup>

<sup>7</sup> Herbert Simon laid the groundwork in this area by questioning human cognitive capacity to make complex economic decisions, which he called bounded rationality. Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 499 (1979).

<sup>8</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 412–13 (2011); Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, in CHOICES, VALUES AND FRAMES 159, 170 (Daniel Kahneman & Amos Tversky eds., 2000); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

<sup>9</sup> See B. Douglas Bernheim & Antonio Rangel, *Beyond Revealed Preference: Choice-Theoretic Foundations for Behavioral Welfare Economics*, 124 Q.J. ECON. 51, 51 (2009) (“[B]ehavioral economics has grown in recent years, stimulated by accumulating evidence that the standard model of consumer decision-making may provide an inadequate positive description of behavior.”).

<sup>10</sup> Among the more salient cognitive biases are framing effects, the availability heuristic, present bias, optimism bias, and difficulty in understanding probabilities. See generally KAHNEMAN, *supra* note 8 (defining terms and summarizing supporting studies).

<sup>11</sup> See Robert J. Shiller, *The Rationality Debate, Simmering in Stockholm*, N.Y. TIMES, Jan. 19, 2014, at BU6 (discussing the different views of human rationality held by the three Prize recipients, Eugene F. Fama, Lars Peter Hansen, and Robert J. Shiller).

<sup>12</sup> See, e.g., Glaeser, *supra* note 2, at 133 (arguing that “flaws in human cognition should make us more, not less, wary about trusting government decisionmaking”); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1035 (2012) (arguing that behavioral law and economics policies threaten liberty); Bruce Ian Carlin et al., *When Does Libertarian Paternalism Work?* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 15139, 2009), available at <http://www.nber.org/papers/w15139> (arguing that government can make errors of judgment that decrease total welfare as much or more than individual errors).

<sup>13</sup> Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1173–74 (2003); Wright & Ginsburg, *supra* note 12, at 1040.

The debate among economists spread to the legal literature with works like those by Richard Thaler and Cass Sunstein.<sup>14</sup> Their heirs in law schools quickly adopted behavioral economic theories to justify some, though not all, government regulations that could help people avoid making these cognitive errors.<sup>15</sup> It is here that the definition of paternalism became a critical factor in analyzing normative justifications for government regulation.

What these scholars have in common is a very broad notion of paternalism—one that includes interventions targeting industry as well as those targeting individuals.<sup>16</sup> This definition treats almost any effort to protect people—whether employees, consumers, or individuals outside commerce—as paternalistic and therefore presumed unjust without special justification. In particular, it puts government proposals to regulate industry to the same proof as proposals to directly regulate people. It is this definition and its implications that I find unconvincing.

### III. PROBLEMS WITH THE ECONOMIC VERSION OF PATERNALISM

Historically, government action was considered paternalistic if it required, forbade, or restricted action by an individual for the personal benefit of that individual and not for the benefit or protection of others.<sup>17</sup> For example, Dworkin defined paternalism as “roughly the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person

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<sup>14</sup> See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6–8 (2008) (advocating libertarian paternalism to explain how some laws can help people make good decisions without limiting their liberty); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 29 (2013) (discussing why and how to choose default rules to discourage particular cognitive errors).

<sup>15</sup> See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1214 (2003) (discussing how behavioral economics is in its early stage of development and that paternalistic policies may impose undue burdens); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 215 (2006) (describing government campaigns aimed at changing the behavior of individuals engaged in harmful activities).

<sup>16</sup> See Jeffrey J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, 2011 U. ILL. L. REV. 1675 (describing the use of psychology theories of cognition in behavioral economics to support concepts of paternalism that include constraints on consumer choice).

<sup>17</sup> Dworkin, *supra* note 2, at 65; see FEINBERG, *supra* note 2, at 3 (discussing John Stuart Mill’s principle that invading someone’s liberty for his own good cannot be justified); Shapiro, *supra* note 1, at 527–28 (comparing private paternalism with public paternalism’s generally applicable rules). But see Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121, 158 (2005) (arguing that Feinberg’s definition of justifiable “soft” paternalism includes measures that should be classified as “hard” paternalism).

being coerced.”<sup>18</sup> With a moral presumption against paternalism, any attempt by government to impose such direct regulation on individuals required ample justification, which was rarely forthcoming.<sup>19</sup> In this view, government regulation is paternalistic if legislature or agency A intentionally limits Bill’s liberty because A believes that the regulation will contribute to Bill’s welfare, whether Bill agrees or not.<sup>20</sup>

Behavioral economists and legal scholars in law and economics (behavioral or otherwise) describe paternalism as encompassing any action that ultimately restricts individual choice, without necessarily distinguishing actions that directly target individuals for their own sake from actions that target organizations or other entities to protect third parties, like consumers.<sup>21</sup> In this view, legislature or agency A acts paternalistically when it limits Corporation C’s liberty (for example, by requiring warnings of product risks) in the belief that the intervention will contribute to Bill’s welfare, regardless of either Bill or Corporation C’s consent or preference.

This economic definition of paternalism ignores the target of regulation and instead views government regulation from the perspective of the individual, rather than the entity being regulated.<sup>22</sup> Using this “consumer” perspective, it appears deceptively plausible to argue that the individual suffers a restriction on her freedom of choice. This assumes that the original array of choices was optimal or desired, or that the restriction is not desired, neither of which may be true. The restriction then amounts to a loss of individual liberty that requires justification.<sup>23</sup> Thus, if one accepts the economic perspective on paternalism, the regulation violates the presumption against paternalistic government regulation.

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<sup>18</sup> Dworkin, *supra* note 2, at 65; see Joel Feinberg, *Legal Paternalism*, in PATERNALISM 3, 3 (Rolf Sartorius ed., 1983) (defining the principal of legal paternalism and its justification to protect individuals from self-inflicted harm).

<sup>19</sup> Pope offers a comprehensive examination of variations and nuances in definitions of paternalism. Pope, *supra* note 2, at 660–63. For a discussion of regulations based primarily on moral grounds, see *infra* text accompanying notes 59–61.

<sup>20</sup> Pope classes this type of example as hard paternalism. Pope, *supra* note 2, at 683–84.

<sup>21</sup> *E.g.*, Camerer et al., *supra* note 15, at 1213; Glaeser, *supra* note 2, at 153–54; Wright & Ginsburg, *supra* note 12, at 1062–65.

<sup>22</sup> This approach has some support among those who categorize regulating the business to protect the public as indirect paternalism, in contrast to direct paternalism, which targets the individual. See CHILDRESS, *supra* note 2, at 18 (discussing how the values used in assessing a certain harm or benefit belong to the individual); FEINBERG, *supra* note 2, at 8–9 (discussing the various distinctions of legal paternalism and their effects); Pope, *supra* note 2, at 689 (discussing the difference between active and passive paternalism between the agent and subject).

<sup>23</sup> Sunstein and Thaler argue that such restrictions do not really limit liberty. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161–62 (2003). For contrary views, see Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1263 (2005); Pope, *supra* note 2, at 672–73; Wright & Ginsburg, *supra* note 12, at 1067.



As long as all such regulations are deemed to be paternalistic, they demand justification. The major contribution of Sunstein and Thaler has been to offer a justification for some of these regulations. Behavioral economists and their colleagues in law schools thus refine their definition of paternalism to defend the kinds of regulation they consider desirable or inoffensive, such as information disclosure and warnings. These are often called permissible interventions of “soft paternalism.”<sup>24</sup>

Sunstein argues that paternalism is really a continuum from soft to hard.<sup>25</sup> That continuum still makes no distinction among the targets of regulation. Remarkably, his examples of hard paternalism include both fuel-economy standards and a criminal ban on same-sex relations.<sup>26</sup> Glaeser finds that the Surgeon General’s warnings of the dangers of cigarette smoking in 1965 “can be seen as a successful paternalistic intervention (especially of the softer kind)” and cites tax rates as an example of hard paternalism.<sup>27</sup> Among Friedman’s examples of paternalism are fluoridation of the water supply, labeling genetically-modified organisms in the food supply, and prohibitions on marijuana use.<sup>28</sup> Under these definitions, the line between permissible and impermissible regulation seems arbitrary. Sunstein would distinguish the two by the magnitude of the cost imposed on an individual (regardless of its source), with high costs leaning toward hard paternalism and small costs toward soft paternalism.<sup>29</sup> But this assumes that any cost to anyone is necessarily paternalistic. Moreover, it is not clear that cost is the correct measure.

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<sup>24</sup> See Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175 (2003) (describing the concept of libertarian or soft paternalism that warrants policies to change personal behavior without limiting liberty); see also Glaeser, *supra* note 2, at 149 (describing soft paternalism as “government policies that change behavior without actually changing the choice sets of consumers”); Rachlinski, *supra* note 2, at 226 (describing “weak paternalism in which the law does not prohibit choice, but alters the context in which people make decisions”).

<sup>25</sup> Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1859–60 (2013). Others have described a similar distinction or continuum from impure to pure paternalism or weak to strong paternalism. *E.g.*, Dworkin, *supra* note 2, at 68.

<sup>26</sup> Sunstein, *supra* note 25, at 1861. His examples of soft paternalism include fuel economy labels and automatic enrollment in a particular political party. *Id.*

<sup>27</sup> Glaeser, *supra* note 2, at 148, 152.

<sup>28</sup> David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1753–65 (2014). Friedman’s most striking example is that of a lifeguard who knows that broken glass is on the beach. *Id.* at 1697. Friedman describes the lifeguard’s options, from doing nothing to warning beach goers to requiring them to wear sandals. *Id.* at 1697–98. In his view, all these options deprive beach goers of autonomy, but apparently qualify as justifiable paternalism. *Id.* What about telling the lifeguard to pick up the glass as part of his job?

<sup>29</sup> Sunstein, *supra* note 25, at 1859–60. Sunstein emphasizes social welfare as the justification, which he defines in terms of cost-benefit analysis: whether the likely benefits to society exceed the costs to the entity that is regulated, or whether the social costs of unregulated conduct are large. In this view, hard paternalism imposes material costs on the end-user, while soft paternalism would impose only small (non-material) costs on the end-user (or consumer). *Id.*

The economic definition of paternalism equates the freedom of a business to operate with a natural person's liberty. It supports the idea that corporations should enjoy the same rights as natural persons.<sup>30</sup> If paternalism is defined as imposing costs on consumers (individuals), then paternalism can include the regulatory costs imposed on business that may (or may not) result in costs to consumers. Hence the conclusion that paternalism includes any regulation of business that requires product standards, safety standards, or warnings of risks that might increase the cost of the product to a consumer.

This economic perspective on paternalism creates what Kahneman might call a "frame."<sup>31</sup> By framing paternalism as including any regulation that might affect consumer choice, adherents of behavioral economics narrow the acceptable justifications for a great deal of government regulation to those that produce a favorable cost-benefit analysis using economic definitions of cost and welfare. Discourse and disagreement can only occur at the margins, such as the size of costs and benefits, and excludes alternative reasons for regulation, as discussed below.

This debate might be dismissed as merely an intellectual turf battle among academics but for its profound effect on public policy, especially laws protecting public health and safety. The effect is to circumscribe the scope of acceptable policy options to those advocated by contending economic theories, most of which favor limiting industry regulation.

#### IV. GOVERNMENT REGULATION OF INDUSTRY

The economic definition of paternalism opens a wide range of statutes that impose rules on businesses and other organizations to the claim that those rules are paternalistic and therefore unjustified. These include minimum wage laws, building codes, new drug approval requirements, product safety standards, anti-pollution requirements, anti-discrimination laws, consumer protection disclosure requirements, professional licensure laws, and many others. This represents a change in policy discourse, since few such laws have been opposed on grounds of paternalism, at least since the *Lochner* era.<sup>32</sup> Moreover, court opinions addressing these post-*Lochner* laws dismiss any idea that they might be paternalistic.<sup>33</sup>

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<sup>30</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) ("Congress . . . included corporations within RFRA's definition of 'persons.'"); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349 (2010) (describing free speech rights of corporations as rights of "associations of citizens").

<sup>31</sup> See KAHNEMAN, *supra* note 8, at 363–69 (describing framing and research on framing).

<sup>32</sup> See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a state law barring employers from requiring employees to work more than sixty hours per week as interfering with freedom of contract).

<sup>33</sup> See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) (upholding Washington State's minimum wage law for women because the "legislature has necessarily a wide field of

Government, on the other hand, has defended such laws by the need to prevent industry from harming or exploiting consumers, workers, or the population at large.<sup>34</sup> The government's purpose is not to regulate a business for the benefit of the business itself, but to prevent the business from harming or exposing others to risk, especially where individuals and industry have unequal information or bargaining power. Consider the following examples. The Food, Drug, and Cosmetic Act prohibits the sale or distribution of contaminated foods.<sup>35</sup> Contrary to some economic assumptions, this deprives no individual of freedom of choice. Is anyone eager for the freedom to eat contaminated food? Laws requiring banks to disclose the cost of variable interest rate loans are intended to give consumers information they do not have and could not easily obtain otherwise,<sup>36</sup> while banks may have a financial incentive to disguise the true costs. Are consumers deprived of their preference for obtaining usurious loans? Or are banks prevented from deceptive practices that increase their profits and impose unnecessary losses on consumers? Businesses sometimes argue that minimum wage laws deprive workers of the "freedom" to work for less money. As the U.S. Supreme Court once noted with respect to labor laws limiting maximum hours for workers, that argument would be more credible if it came from the workers instead of the employer.<sup>37</sup>

None of these laws should be considered paternalistic. They regulate the practices of industry for the purpose of preventing harm to others—the public. They do not deprive the public of any choice that anyone—rational or otherwise—would make voluntarily. And many may prevent businesses

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discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression"); *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (upholding a state law barring certain employers from requiring women employees to work more than ten hours per day to protect the health of the women and their offspring).

<sup>34</sup> For example, people in West Virginia are sometimes viewed as having anti-regulatory preferences, at least until about 300,000 of them could not drink their tap water. Then came questions about why the government had not acted to prevent the contamination by 4-methylcyclohexane methanol from Freedom Industries' property. Leigh Ann Caldwell, *West Virginia: New Health Hazard, Same Story?*, CNN (Jan. 19, 2014), <http://www.cnn.com/2014/01/16/politics/west-virginia-chemical-water/>; Wilson Dizard, *Coal Mining's Long Legacy of Water Pollution in West Virginia*, ALJAZEERA AM. (Jan. 13, 2014), <http://america.aljazeera.com/articles/2014/1/13/coal-pollution-miningwestvirginiamassey.html>; *West Virginia Company Behind Water Contamination Cited at Second Facility*, THE GUARDIAN (Jan. 15, 2014), <http://www.theguardian.com/world/2014/jan/15/west-virginia-company-water-contamination-cited-second-facility>.

<sup>35</sup> 21 U.S.C. § 331(b) (2012).

<sup>36</sup> See, e.g., 15 U.S.C. § 1601 (2012) (describing the need to provide "meaningful disclosure" to consumers and "avoid the uninformed use of credit").

<sup>37</sup> See *Holden v. Hardy*, 169 U.S. 366, 397 (1898) ("[The employer's] defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class.").

from exploiting the very cognitive biases in their customers that psychologists have identified.<sup>38</sup>

Today's proponents of "libertarian paternalism,"<sup>39</sup> or "asymmetric paternalism,"<sup>40</sup> appear to take a different view. They seem to believe that any regulation of business, such as a requirement that automobile manufacturers install brakes in their cars, must be paternalistic, because it restricts consumer choices.<sup>41</sup> (How many consumers are looking for a car that cannot stop?) For example, they might view a regulation that limits the serving size of soda containers to sixteen ounces as paternalistic because it limits the choices of consumers who want to buy soda.<sup>42</sup> This seems mistaken, for the same reasons that regulating food processors, banks, and employers does not limit individual choice.

It is true, had the portion cap rule been upheld, consumers would have had fewer or different options than before. But that, by itself, does not make the rule paternalistic. The New York City Board of Health would not regulate consumers; it would regulate certain stores that sell soda in cups. Like most industry regulation, it would restrict the freedom of certain businesses to engage in specific business practices.<sup>43</sup> The purpose of the rule was to benefit consumers—by discouraging them from drinking too much high calorie soda.<sup>44</sup> But, from the perspective of the stores, the rule was intended to benefit third parties—the consumers—and not to benefit the stores themselves. Regulations like these should not be considered paternalistic. Nonetheless, the economic view of paternalism would likely consider the rule as an example of soft paternalism.

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<sup>38</sup> See, e.g., Jolls & Sunstein, *supra* note 15, at 207–08 (arguing that consumer safety laws protect consumers from "optimism bias").

<sup>39</sup> See Thaler & Sunstein, *supra* note 24, at 175, 179 (describing libertarian paternalism as both preserving freedom of choice and authorizing "institutions to steer people in directions that will promote their welfare").

<sup>40</sup> Camerer et al., *supra* note 15, at 1212.

<sup>41</sup> If the debate over paternalism is conducted in terms of moral principles, then perhaps this view should not be limited to government regulation. If any change in the choices available to consumers can be considered paternalistic, then a business that alters its products could be accused of acting paternalistically and challenged to justify its action.

<sup>42</sup> See *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 698 (2014) ("By restricting portions, the Board necessarily chose between ends, including public health, the economic consequences associated with restricting profits by beverage companies and vendors, tax implications for small business owners, and personal autonomy with respect to the choices of New York City residents concerning what they consume."). The New York Court of Appeals did not entertain any argument based on paternalism, but struck down the rule as beyond the authority of the Board of Health. *Id.* at 701.

<sup>43</sup> See *id.* at 690 ("The Portion Cap Rule provides in relevant part that '[a] food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces' . . . ." (quoting 24 R.C.N.Y. § 81.53(b) (2013))).

<sup>44</sup> *Id.* at 698; see also *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 2013 N.Y. Misc. LEXIS 1216, \*8–12 (N.Y. Sup. Ct. Mar. 11, 2013) (summarizing the Board of Health's reasoning).

Soft paternalism appears to include such measures as requiring industry to disclose (accurate) information and warnings of risks to consumers, default rules like automatic enrollment in pension and health plans, and choice architecture in the environment, such as placing fruits and vegetables first in the cafeteria line.<sup>45</sup> They are often justified as “de-biasing,” providing factual cues to correct consumers’ errors of judgment about their own preferences.<sup>46</sup> Yet, it is difficult to see such measures as paternalistic. They do not regulate the consumer at all; they require an industry to change its practices to give consumers information they may lack or an efficient way to accomplish a personal goal. They do not restrict choice; they often expand choice. If, as Sunstein correctly argues, existing choice architecture is unavoidable and often arbitrary,<sup>47</sup> restructuring the existing presentation of choices without removing any can hardly impose a new restriction on the consumer’s liberty.

Adherents of behavioral economics argue that these so-called soft paternalistic policies can be justified as an exception to the presumption against paternalism because they counteract cognitive biases and encourage rational or healthy choices without entirely eliminating a person’s liberty to choose the “irrational” or unhealthy option.<sup>48</sup> The psychology literature is used to support the claim that such measures are designed to help the individual choose what she would voluntarily prefer in the absence of bounded rationality. But such an argument is superfluous if the policies are acknowledged not to be paternalistic.

The foregoing suggests a possible reason why economists and legal scholars who adopt economic theories conceptualize so many laws and regulations as paternalistic. Doing so implies that government must demonstrate as good a reason to regulate business practices as it must provide to regulate individual behavior. This is inconsistent with the standards for determining the constitutionality of legislation, since most constitutional standards for upholding economic regulations are lower than those for upholding legislation that intrudes on important personal

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<sup>45</sup> See, e.g., Sunstein, *supra* note 25, at 1835, 1896–97 (stating that the first general principle of behaviorally informed regulation is: “in the face of behavioral market failures, the best responses usually are disclosures of information, warnings, default rules, and other kinds of nudges, at least when there is no harm to others” (emphasis omitted)).

<sup>46</sup> See Camerer et al., *supra* note 15, at 1235 (discussing consumer responses to information provided on food labels); Jolls & Sunstein, *supra* note 15, at 207–08 (discussing the concept of “debiasing” through consumer safety law).

<sup>47</sup> Sunstein, *supra* note 14, at 5.

<sup>48</sup> See Sunstein & Thaler, *supra* note 23, at 1161–62 (arguing that libertarian paternalistic restrictions do not actually limit liberty). But see Mitchell, *supra* note 23, at 1035 (disagreeing with Sunstein and Thaler’s claim that “their proposed policy interventions do not entail a significant reduction in liberty and individual autonomy”); Pope, *supra* note 2, at 672–73 (discussing that, while soft paternalism does not “usurp autonomy,” it does interfere with liberty); Wright & Ginsburg, *supra* note 12, at 1034, 1067 (arguing that paternalistic policies restrict individual autonomy).

liberties.<sup>49</sup>

## V. GOVERNMENT REGULATION OF INDIVIDUALS

The concept of paternalism as used in behavioral economics may make it harder to justify government regulation of industry, but it also makes it easier to find reasons for government to regulate individuals directly.<sup>50</sup> This is because the reasons for making an exception to the presumption against paternalism are based on cognitive errors and cost-benefit comparisons.

Cognitive biases are human traits. If people need to be corrected, what better way than by requiring people to do the “right” thing? Proponents of soft paternalism seem to assume that soft restrictions do not significantly limit personal liberty or autonomy, because if people had perfect information or were free of their cognitive biases, they would really want what the government is encouraging or requiring.<sup>51</sup> In this view, the regulation contributes to the individual’s “real” subjective preferences as the individual would define them given perfect rationality and accurate information.

However, if this is the reason that soft forms of paternalism do not limit liberty, then why should stronger forms of regulation be seen to limit liberty? On this reasoning, a requirement that a person act according to his “real” preferences—those required or forbidden by government—could be justifiable as a permissible exception to paternalism, whether soft or hard. Of course, it is typically assumed that the person’s “real” preference is for

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<sup>49</sup> See 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE § 14.6(a)(ii) (5th ed. 2013) (“If the law can arguably be said to rationally relate to a legitimate goal of government, the Court will uphold the law even though the Justices might disagree with the wisdom of its provisions. . . . Under the strict scrutiny standard the Court requires that the law be necessary to promote a compelling or overriding interest of government if it is to limit the fundamental rights of individual citizens.”).

<sup>50</sup> See Rachlinski, *supra* note 13, at 1166 (“[V]irtually every scholar who has written on the application of psychological research on judgment and choice to law has concluded that cognitive psychology supports institutional constraint on individual choice.”); see also George Loewenstein et al., *Asymmetric Paternalism to Improve Health Behaviors*, 298 JAMA 2415, 2415–16 (2007) (discussing asymmetric paternalism policies to improve personal health behaviors); Theresa M. Marteau et al., *Changing Human Behavior to Prevent Disease: The Importance of Targeting Automatic Processes*, 337 SCIENCE 1492, 1493 (2012) (discussing the alteration of environments in order to constrain human behavior); Robert A. Skipper, *Obesity: Towards a System of Libertarian Paternalistic Public Health Interventions*, 5 PUB. HEALTH ETHICS 181, 181, 187 (2012) (discussing libertarian paternalism in the context of the MyPlate initiative); Lindsay F. Wiley, *Rethinking the New Public Health*, 69 WASH. & LEE L. REV. 207, 220 (2012) (discussing the “‘behavioral’ model” in the context of HIV patients).

<sup>51</sup> See Jim Holt, *The New, Soft Paternalism*, N.Y. TIMES MAG., Dec. 3, 2006, at 15 (describing “soft” paternalism as “new,” in comparison to the “old ‘hard’ paternalism”). But see Mario J. Rizzo & Douglas Glen Whitman, *The Knowledge Problem of New Paternalism*, 2009 BYU L. REV. 905, 910 (describing and critiquing soft paternalism).

the safe, healthy, or efficient choice.<sup>52</sup> This is an empirical question, although perhaps not one for which an adequate experiment could be designed. How can we know what will contribute to anyone's welfare? In the absence of evidence, whose conception of what people really want should control?<sup>53</sup> If cognitive biases alone justify laws to correct individual behavior, then there appears to be little limit to the conduct and choices that can be required or forbidden of individuals.

The rationale based on cost points in the same direction. Paternalistic regulation presumably costs individuals rather little, while the possible (and often speculative) societal benefits typically appear large.<sup>54</sup> If there is no difference between regulating people and things (such as businesses), and the justification for regulation is that the expected social benefits of regulation exceed the costs to the individual, then it is easier to justify requirements (or prohibitions) for individuals. The cost of compliance is often minimal for each individual, whereas the aggregate costs to industry may be substantial. Defining costs and benefits solely in financial or economic terms tips the scales in favor of regulating people. Psychic costs attending individual deprivations of liberty are rarely considered, despite the urging of critics of behavioral economics and law.<sup>55</sup>

These reasons for "soft paternalistic" measures lay the conceptual foundation for increased "hard paternalistic" regulation of individuals. Will hard paternalism necessarily increase in practice? The evidence is mixed so far. Glaeser cites increasingly strict regulation of alcohol (leading to prohibition) and cigarette smoking as examples of the power of soft paternalism to encourage public acceptance of hard prohibitions.<sup>56</sup> Friedman, on the other hand, argues that public resistance to paternalistic measures appears to be growing.<sup>57</sup> Here again, one's definition of paternalism may account for the different perspectives.

There may be declining public support for government regulation that

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<sup>52</sup> See Shapiro, *supra* note 1, at 536 ("[T]he benevolent have a tendency to colonize, whether geographically or legally." (alteration in original) (quoting Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 557 (1967)) (internal quotation marks omitted)).

<sup>53</sup> See Camerer et al., *supra* note 15, at 1250–51 (arguing in favor of asymmetric paternalism); Carlin et al., *supra* note 12, at 16–17 (arguing in favor of libertarian paternalism).

<sup>54</sup> A legislature may have limited capacity to conduct an accurate cost-benefit analysis to decide whether a purportedly paternalistic bill will produce more benefits than costs due to a lack of expertise, interest group pressure, and legislators' own cognitive biases. See GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE* 14–15 (2002) (discussing the complicated motives of government officials).

<sup>55</sup> See, e.g., Wright & Ginsburg, *supra* note 12, at 1072 ("The fatal flaw of libertarian paternalism is to ignore the value of the freedom to err.").

<sup>56</sup> Glaeser, *supra* note 2, at 153–54.

<sup>57</sup> See Friedman, *supra* note 28, at 1692 ("[Certain] flashpoint zones show a general rejection of paternalism—especially visible, hard paternalism.").

prohibits personal conduct believed to be immoral. At the same time, there appears to be growing support for certain types of regulation intended to protect public health.<sup>58</sup> The distinction may be difficult to identify in some instances, but it is important for the purpose of justifying government regulation of individuals.

Many prohibitions on personal choices were enacted to protect the morals of the public.<sup>59</sup> These have included prohibitions on adultery and fornication, marriage between persons of different races or the same sex, and contraceptive use and abortion, as well as prohibitions on prostitution.<sup>60</sup> The national experiment with prohibition against alcohol might also be included.<sup>61</sup> Such laws can be considered paternalistic, because they were intended for the good of those regulated. They bind individuals to a particular code of morality for the purpose of ensuring that people act in what a majority of the legislature determines to be the proper standard of conduct for the population. But modern U.S. Supreme Court decisions have largely rejected protection of public morals as a constitutionally sufficient government purpose.<sup>62</sup> This is especially true in cases involving individual decisions about medical care, which affirm the

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<sup>58</sup> See, e.g., Wendy E. Parmet, *Beyond Paternalism: Rethinking the Limits of Public Health Law*, 46 CONN. L. REV. 1771, 1787–88 (2014) (noting that society has grown increasingly willing over time to accept certain paternalistic measures, such as seat belts and smoking bans); *Section 2: Views of Government Regulation*, PEW RES. CENTER FOR PEOPLE & PRESS (Feb. 23, 2012), <http://www.people-press.org/2012/02/23/section-2-views-of-government-regulation/> (describing “broad” public support for “strengthening regulations or keeping current regulations as they are now rather than reducing regulations” regarding food safety).

<sup>59</sup> See, e.g., JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 228–29 (2003) (describing the history of the Comstock Act, which prohibited the distribution of contraceptives, abortifacients, or lewd or lascivious publications or materials through the mail).

<sup>60</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2683, 2693 (2013) (striking down Section 3 of DOMA’s prohibition on same-sex marriage and noting the House of Representatives’ purpose in its enactment, i.e., to “defend the institution of traditional heterosexual marriage”); *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (striking down a Texas statute prohibiting “deviate sexual intercourse with another individual of the same sex”); *Roe v. Wade*, 410 U.S. 113 (1973) (striking down a Texas statute criminalizing an abortion except to save the life of the mother); *Eisenstadt v. Baird*, 405 U.S. 438, 440–42 (1972) (striking down a Massachusetts statute that barred single persons from obtaining contraceptives to prevent pregnancy); *Loving v. Virginia*, 388 U.S. 1, 4–5 (1967) (striking down Virginia law prohibiting marriage between “a white person and a colored person”); *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965) (striking down Connecticut statute prohibiting the use of contraception); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) (striking down a Massachusetts marriage licensing statute that prohibited same-sex couples from marrying).

<sup>61</sup> U.S. CONST. amend. XVIII, § 1 (repealed by U.S. CONST. amend. XXI). See generally DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010).

<sup>62</sup> *Lawrence*, 539 U.S. at 571 (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)) (internal quotation marks omitted)). But see *Gonzales v. Carhart*, 550 U.S. 124, 158–60, 163 (2007) (accepting “ethical and moral concerns that justify a special prohibition” as one of several state interests in prohibiting physicians from using a specific abortion procedure).



individual's right to accept or refuse care for any reason.<sup>63</sup> Thus, laws enacted to promote a particular moral or religious code, without an additional purpose, can no longer be assumed to qualify as justifiable paternalism.

Legislation that prohibits the sale or distribution of certain products can feel paternalistic when the product is something that people desire. The prohibition is directed at the seller or distributor, not the consumer, but the consumer may be deprived of the product nonetheless. Such laws might be considered examples of indirect paternalism—the regulation of sellers for the ultimate purpose of protecting the individual from harm. Pope helpfully distinguishes (a) indirect regulation, like prohibiting the sale of marijuana, intended to protect a person from harm or risk to which that person consents, from (b) the harm principle, which he limits to regulation that protects a person from unconsented harm, such as product safety standards.<sup>64</sup> The latter fits within the class of non-paternalistic regulations that prevent industry from harming consumers and the public in general. The former raises more difficult questions. However, classifying prohibitions against the sale of contraceptives, for example, as paternalistic, even weakly or indirectly paternalistic, does not resolve the question of whether such prohibitions are justifiable.

The practical question is whether the government has the constitutional power to effectively preclude the public from access to the product or service. Here, one can use the applicable due process standard, which considers whether individuals have a cognizable right to the product or service. The degree and kind of justification for banning or restricting access (by regulating the seller) depends on the right at stake, with intrusions on important and fundamental rights requiring greater justification than interference with less significant rights.<sup>65</sup> Since, for the most part, disputes involve intrusions on aspects of liberty, the standards of judicial review evaluate the cost that is really at stake in conceptions of paternalism—the loss of liberty. Due process standards are crude, to be sure, and often outcome determinative, but as heuristics, at least they

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<sup>63</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (explaining that previous Court decisions implied that a “competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment”). See generally GEORGE J. ANNAS, *THE RIGHTS OF PATIENTS: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF PATIENTS* (3d ed. 2004).

<sup>64</sup> Pope includes indirect paternalism in his definition of paternalism, but not regulation based on the harm principle. See Pope, *supra* note 2, at 687–88 (explaining the differences between indirect and direct paternalism and asserting that “[i]ndirect paternalism . . . might, at first, seem subsumable under the harm principle” but indirect paternalism deals with consented harm as opposed to unconsented harm).

<sup>65</sup> Compare *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding an Oklahoma statute prohibiting opticians from fitting or duplicating eyeglass lenses without a prescription under a rational basis standard), with *Griswold*, 381 U.S. 479, 485 (striking down a statute prohibiting the use of contraceptives under a strict scrutiny analysis).

distinguish economic costs from individual rights and autonomy.

A statute that appears to be paternalistic can often be justified on independent, non-paternalistic grounds.<sup>66</sup> For example, prohibitions against the use of controlled substances have been justified on the non-paternalistic ground that such use leads to criminal conduct that harms the public at large.<sup>67</sup> Fluoridating a municipal water supply does not regulate individuals, even if it makes the choice to drink non-fluoridated water slightly more costly to people.<sup>68</sup> Criminal prohibitions on prostitution have been justified as necessary to protect sex workers from coercive human trafficking.<sup>69</sup> Even if these rationales appear pretextual (and perhaps motivated by moral concerns), they focus the legislature's attention on the harm to the public and are (in theory) subject to removal if the evidence indicates that they fail to achieve their purpose.

Even where laws most obviously require people to protect themselves, courts struggle to find an other-oriented, public purpose to avoid upholding paternalism. For example, courts have used somewhat tortured reasoning to conclude that motorcycle helmet laws protect people other than the rider, even though this is neither the primary motive nor effect of such

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<sup>66</sup> See Shapiro, *supra* note 1, at 532 ("The point is that paternalist motives are more likely to lead to enactment of legislation when they are coupled with other motives that are seen to have independent weight, or when the situation falls on the weak side of the weak-strong continuum.").

<sup>67</sup> See Controlled Substances Act, 21 U.S.C. §§ 841(a)(1), 844(a) (2012) (prohibiting the manufacture, distribution, dispensing or possession of controlled substances except as permitted therein); see also *United States v. Simpson*, 481 F.2d 582, 584 (5th Cir. 1973) ("It is beyond constitutional doubt that Congress has the inherent power to adopt penal and rehabilitative provisions in response to the present pervasive drug traffic problem. This is particularly true when the quantity of the drug and its dangerous ingredients affect not only the individual user but society as well."); DAVID F. MUSTO, *THE AMERICAN DISEASE* 219 (1987) (describing the belief in the early 1900s that Mexican laborers were provoked into violence by smoking marijuana).

<sup>68</sup> The public health reason for fluoridation—prevention of dental caries, especially among children whose teeth are being formed and are without access to dental care—may not be necessary to protect life or limb, but it is undertaken by government entities for the benefit of third parties and has been uniformly upheld as constitutional by state courts. See, e.g., *Ill. Pure Water Comm., Inc. v. Dir. of Pub. Health*, 470 N.E.2d 988, 992 (Ill. 1984) ("We note that many courts, in the interest of public health, have upheld fluoridation as a proper exercise of the State's police power."); *City of Port Angeles v. Our Water—Our Choice!*, 239 P.3d 589, 593 (Wash. 2010) (noting that "[t]he legislature ha[d] explicitly vested the power to decide whether or not to fluoridate in the board of commissioners of a water district"). The debate today is often an empirical one regarding the level of fluoride that prevents dental caries without the risk of dental fluorosis. E.g., *Proposed HHS Recommendation for Fluoride Concentration in Drinking Water for Prevention of Dental Caries*, 76 Fed. Reg. 2383, 2383–86 (Jan. 7, 2011).

<sup>69</sup> See Belkys Garcia, *Reimagining the Right to Commercial Sex: The Impact of Lawrence v. Texas on Prostitution Statutes*, 9 N.Y. CITY L. REV. 161, 163 n.14 (2005) ("Some feminists have argued that maintaining criminalization of prostitution may be the best way to protect women in prostitution.").

laws.<sup>70</sup> Justification of laws restricting smoking depends heavily on the adverse effects of environmental tobacco smoke on others.<sup>71</sup> This suggests a general reluctance, at least in the judiciary, to regulate personal behavior solely for the protection of the individual.

The Massachusetts requirement that individuals be covered by public or private health insurance can be viewed as hard paternalism, because it mostly protects the individual from financial ruin in case of illness.<sup>72</sup> But, it was also viewed as spreading the risk of financial loss. The Affordable Care Act's individual mandate was upheld as a tax, and Congress's constitutional authority to impose a tax is not constrained by any personal right not to be taxed at all.<sup>73</sup> Yet, scholars debate whether sin taxes (for example, on tobacco, alcohol, soda, or gasoline) are paternalistic and/or effective.<sup>74</sup> While there might be moral reasons against imposing a sin tax, there is no constitutional impediment to doing so.

Civil commitment statutes may be the clearest example of laws that allow the government to prevent a person from harming himself, but there are limits to this example. The primary purpose of civil commitment is protecting others by detaining a person who is likely to harm others (or their property) as a result of a mental illness that makes it difficult for the person to control his conduct.<sup>75</sup> This is a non-paternalistic standard. However, most states also authorize civil commitment of persons who are mentally ill and dangerous to themselves,<sup>76</sup> such as persons who attempt

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<sup>70</sup> See, e.g., *People v. Poucher*, 247 N.W.2d 798, 799–800 (Mich. 1976) (noting that “[i]f the helmet succeeds in mitigating what would otherwise be a fatal injury, then not only has the cyclist survived, but the automobile driver has not killed anyone”).

<sup>71</sup> See Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 720–22 (2009) (discussing the justifications for smoking bans as progressing from efforts to prevent individuals from smoking to focusing on the harm to others to trying to reduce smoking overall).

<sup>72</sup> 2006 Mass. Acts 58. The Affordable Care Act's individual mandate does not actually force anyone to buy insurance; those covered may decline to do so and the penalty is relatively small. 26 U.S.C. § 5000A(c)(1) (2012).

<sup>73</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012). *But see id.* (“Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.”).

<sup>74</sup> See, e.g., Ted O'Donoghue & Matthew Rabin, *Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes*, 93 AM. ECON. REV. 186, 190 (2003) (analyzing alternative approaches to sin taxes as more or less efficient and more or less paternalistic).

<sup>75</sup> *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (upholding civil commitment statutes when they require proof of dangerousness and “some additional factor, such as a ‘mental illness’ or ‘mental abnormality’”); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“The State may also confine a mentally ill person if it shows ‘by clear and convincing evidence that the individual is mentally ill and dangerous.’”); see also *City of Newark v. J.S.*, 652 A.2d 265 (N.J. Super. Ct. 1993) (applying analogous standards to civilly commit a homeless person with transmissible tuberculosis who was unable to avoid spreading the disease to others unless confined).

<sup>76</sup> E.g., FLA. STAT. ANN. § 394.467(1)(a)(2)(b) (West 2011); MASS. GEN. LAWS ch. 111M, § 2 (2013).

suicide, which is a paternalistic standard.<sup>77</sup> Yet, it fits with the state's *parens patriae* power to protect from imminent harm those who cannot keep themselves safe from imminent harm.<sup>78</sup> This power has not been extended to restricting the liberty of anyone who fails to avoid the risk of possible future harm to herself.

Scholars advocating the economic concept of soft paternalism, however, often focus not on a person who harms himself, but on a person who acts (or fails to act) in a manner that presents a risk of future harm to himself. In some instances, the concern goes even further: that a person fails to take affirmative steps to improve his own health. If protection of one's own health, in general, became a standard for government regulation of personal behavior, then it might only be a small step to restrict even such cherished rights as the right to informed consent to medical care in order to ensure that the patient's health is protected—or that the patient continues to live—regardless of the actual preferences of the patient.<sup>79</sup>

The arguments favoring paternalism measures for individuals are moving beyond preventing individuals from actually harming themselves to preventing individuals from taking *any risk* of future harm to themselves. Some of this may be attributed to public health research, particularly epidemiological studies, that helpfully identify risks to health across a population.<sup>80</sup> From the perspective of the public health community, the presumption is that people would want to avoid risks of serious disease or death. Such generalizations can be sufficient reason to prohibit industry from distributing products or conducting business in such a manner as to expose the public to the risk of harm. When individuals themselves are required to avoid risks, however, the standards should and do differ.

Public health's relatively recent emphasis on preventing chronic diseases undoubtedly encouraged attention to individual behavior as a risk

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<sup>77</sup> It is possible that a person who attempts suicide is not mentally ill and is acting rationally and deliberately, but in the absence of knowing what an unconscious person actually wishes, the presumption of mental illness provides the person with an opportunity to live and make her wishes known.

<sup>78</sup> See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (“[T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.”).

<sup>79</sup> See Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 257 (2005) (“Public health programs that focus on aggregate outcomes for a population cannot account for individual values in the same manner as medicine.”).

<sup>80</sup> See generally WENDY E. PARMET, *POPULATIONS, PUBLIC HEALTH, AND THE LAW* 34 (2009) (arguing for a “population-based legal analysis” of public health and other social policies).

factor for heart disease, cancers, diabetes, and other diseases.<sup>81</sup> Unlike contagious diseases, chronic diseases may arise from a combination of factors—genetic, environmental, social, political, occupational, financial, and behavioral.<sup>82</sup> Epidemiological studies find associations between a risk factor and a disease, but do not necessarily purport to determine whether the factor actually causes the disease.<sup>83</sup> Thus, it is difficult to determine what risks a particular individual may face or the effect of an intervention on any individual, even if the intervention decreases risk across the population. Yet, most recommendations for regulation focus on changing individual behavior, rather than addressing external risks or obstacles, such as those arising from industry or the social, occupational, or economic environment.<sup>84</sup>

The relationship between obesity and chronic diseases is a good example.<sup>85</sup> Changing the behavior of people who are overweight is difficult, and it may or may not significantly affect the trajectory of chronic disease.<sup>86</sup> Yet, most public health policies focus on changing individual behavior rather than the environment, education, agricultural policy, food industry practices, or income; all of which have an effect on health.<sup>87</sup>

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<sup>81</sup> See Thomas R. Frieden, *Asleep at the Switch: Local Public Health and Chronic Disease*, 94 AM. J. PUB. HEALTH 2059, 2059 (2004) (arguing that more public health resources should be dedicated to preventing chronic diseases).

<sup>82</sup> See INST. OF MED., *THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY* 20–21 (2003) (explaining “there is strong evidence that behavior and environment are responsible for more than 70 percent of avoidable mortality” and that “[s]ocial and environmental factors create unnecessary health risks for individuals and entire communities”); OFFICE OF THE SURGEON GEN., *THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 1* (2001) (“For each individual, body weight is determined by a combination of genetic, metabolic, behavioral, environmental, cultural, and socioeconomic influences.”).

<sup>83</sup> See ANN ASCHENGRAU & GEORGE R. SEAGE, *ESSENTIALS OF EPIDEMIOLOGY IN PUBLIC HEALTH* 6 (3d ed. 2014) (defining epidemiology as “[t]he study of the distribution and determinants of disease frequency in human populations and the application of this study to control health problems”).

<sup>84</sup> See, e.g., OFFICE OF THE SURGEON GEN., *supra* note 82, at xi, 1 (focusing on the “opportunity for individuals to make healthy lifestyle choices for themselves and their families” and how healthy diets and regular exercise “should be promoted as the cornerstone of any prevention or treatment effort”). But see WORLD HEALTH ORG., *DIET, NUTRITION AND THE PREVENTION OF CHRONIC DISEASES: REPORT OF A JOINT WHO/FAO EXPERT CONSULTATION* 2–3 (2003) (acknowledging “the essential role of diet, nutrition and physical activity” in preventing chronic diseases but also accounting for “ecological, societal and behavioural” factors when considering the role of nutrition and diets worldwide).

<sup>85</sup> See ABIGAIL C. SAGUY, *WHAT'S WRONG WITH FAT?* 28, 30 tbl. 2.1 (2013) (describing six ways to frame the issue of obesity or fat and how each frame suggests a different policy response).

<sup>86</sup> Friedman is careful to note the limitations of remedial policies, but appears to base his reservations about employing them on their likely effectiveness, suggesting that their paternalistic character is not a moral or legal obstacle to their adoption. Friedman, *supra* note 28, at 1694–95.

<sup>87</sup> See Kelly D. Brownell et al., *Personal Responsibility and Obesity: A Constructive Approach to a Controversial Issue*, 29 HEALTH AFF. 379, 380–82 (2010) (critiquing the focus on personal behavior, and arguing for comprehensive measures to improve the environment affecting food and physical activity).

Many of these policies are justified on behavioral economic grounds, on the theory that overweight and obese people make bad choices that should be corrected by government intervention.<sup>88</sup>

## VI. A CAVEAT

The foregoing necessarily paints with a broad brush and little nuance. None of this should be interpreted as challenging the psychological studies identifying cognitive biases in human thought patterns, which I find convincing. On the contrary, one might productively apply their lessons to our perceptions of the costs and benefits (broadly defined) of different types of health regulation.

## VII. CONCLUSION

Public debate over public health regulation may be suffering from its own bounded rationality. Much of the literature analyzing what justifies government regulation frames the question in terms of a conception of paternalism based on behavioral economic theories, which begin with the premise that paternalism necessarily includes measures directed at industry that are intended to prevent harm to the public. This framing circumscribes the permissible reasons for regulating industry, but expands the rationales for regulating individual behavior. If any regulation that might alter or affect consumer choice is characterized as paternalistic, then a wide range of regulations imposed on industry become questionable. The psychology literature, then, is used to justify or redeem some weaker forms of industry regulation, denominated soft paternalism. The argument is that regulation is necessary in order to compensate for (or take advantage of) defects in human reasoning. But this justification is more easily applied to regulation targeting the individual. That is, if the problem is framed as defects in human cognition, then the range of solutions include (and is often restricted to) correcting human behavior, to the exclusion of preventing industry from putting the public at risk. Justifications based on cost-benefit analysis yield the same result. It is easier to point to errors of human judgment, negligible costs to individuals, and large increases in social welfare, than to demonstrate that regulating industry is not costly to industry. The effect is to discourage regulating industry in ways that protect others from harm and to encourage regulating people for their own

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<sup>88</sup> Friedman, *supra* note 28, at 1719–20. But see Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1912 (2002) (discussing evidence that “experimental subjects—much less real-world legal decision makers—systematically violate norms of rationality when forming judgments and making decisions”).

benefit—quite the opposite of what one should expect from an examination of paternalism.